FILED
JAN 16 1929
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, A. D. 1928

No. 601

THE PEOPLE OF THE STATE OF NEW YORK,
Appellants,

against

GAMBLE LATROBE, JR., JAMES P. KNOWLES and WILLIAM S. ERICHS, trustees in bankruptcy of THERMIODYNE RADIO CORPORATION,
Appellees.

APPELLANTS' STATEMENT AS TO JURISDICTION OF THE COURT UNDER SUBDIVISION 1 OF RULE TWELVE

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The appeal in this case was taken pursuant to the provisions of Section 240 of the Judicial Code providing

> "Any case in a Circuit Court of Appeals where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on a certiorari shall not be allowed at the instance of such party and the review of such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

This case comes before this Court on an appeal under said Statute to review the determination of the United States Circuit Court of Appeals for the Third

Circuit in holding that Section 181 of the Tax Law of the State of New York was unconstitutional in so far as said section provided as follows:

> "Every foreign corporation * * * doing business in this State, shall pay for the use of the State a license fee of ⅛ of 1 per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital stock employed by it within this State during the first year of carrying on its business in this State; * * *. The measure of the amount of capital stock employed in this State shall be such a portion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets wherever employed in business. On the issued capital stock of any corporation issuing shares without designated monetary value such corporation shall pay for the use of the State a license fee of 6 cents on each such share employed in this State as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license shall be paid shall be fixed by the State Tax Commission which shall have the same authority to examine the books and records in the State of such foreign corporation, and the employees thereof, as it has in the case of domestic corporations, and the State Tax Commission shall have the same power to issue a warrant for the collection of such license fees as now exists with regard to domestic corporations."

The Thermiodyne Radio Corporation, the bankrupt herein, now represented by the appellees as trustees, commenced business in the State of New York pursuant to permission duly granted by that State on or about the 12th day of November, 1924, and during the first year of its operation employed in said State two hundred and fifty thousand shares of capital stock of no par value, upon which the Department of Taxation and Finance of the State of New York duly assessed a license fee under the provisions of the State statute quoted at the rate of Six Cents per share amounting in total to the sum of $15,000 for which claim was filed with the trustees herein and which claim was directed to be expunged by the judgment of the United States Circuit Court of Appeals for the Third Circuit, adopting the opinion of the District Court, on the ground that the statute quoted under which the license fee was assessed violated the provisions of the Federal Constitution of the United States.

The People of the State of New York, relying upon such State statute in asserting the validity of the license fee in question and being affected by the determination rendered, have appealed to this Court from such determination after due leave by the United States Circuit Court of Appeals for the Third Circuit. The only question involved in this appeal is whether or not the provisions of Section 181 of the Tax Law of the State of New York, as far as applicable to the instant case, violates the provisions of the Federal Constitution. Should this Court hold the negative then the license fee in question was duly assessed and is a valid claim entitled to a preferential payment by the trustees of the bankrupt.

The mandate of the Circuit Court of Appeals for the Third Circuit is dated December 1st, 1928, and has been duly attached to the certified copy of the record on file with the Clerk of this Court and the appeal

herein was duly allowed by the United States Circuit Court of Appeals for the Third Circuit on the 21st day of December, 1928. That the appellants particularly refer this Court to the opinion of Hon. Hugh M. Morris, District Judge, found on pages 67 to 75 inclusive of the record on file in the office of the Clerk of this Court in this case, upon which said opinion the Circuit Court of Appeals for the Third Circuit rendered its judgment of affirmance, from which it clearly appears that the sole question involved in this case is the constitutionality of the provisions of Section 181 of the Tax Law quoted under the Constitution of the United States. The case is therefore one that comes within the letter and spirit of the Federal Statute cited, in which this Court has jurisdiction to review the constitutional question through appeal by the aggrieved party as was taken in the instant case (*Del Pozo* vs. *Wilson Cypress Co.*, 269 U. S., 82).

Respectfully submitted,

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ROBERT P. BEYER,
Deputy Assistant Attorney-General, of counsel for the Appellants.

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Appellees

BRIEF FOR THE APPELLANTS

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IN THE

UNITED STATES SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK, *Appellants,* against GAMBLE LATROBE, JR., JAMES P. KNOWLES and WILLIAM S. ERICHS, trustees in bankruptcy of Thermiodyne Radio Corporation, *Appellees.*	No. 601 October Term 1928.

APPELLANTS' BRIEF

Preliminary Statement

This is an appeal, pursuant to Sections 239 and 240 of the Judicial Code, from a judgment of the Circuit Court of Appeals for the Third Circuit, affirming an order of the District Court for the District of Delaware, expunging the claim of the State of New York amounting to $15,000, due by the bankrupt, Thermiodyne Radio Corporation, a Delaware corporation, upon having received permission to do business in the State of New York.

The Circuit Court of Appeals held that Section 181 of the New York State Tax Law, providing for a license fee of six cents per share on all stock of no par

value employed by foreign corporations in said state during the first year of such operation was unconstitutional.

The State of New York, being aggrieved by such determination, has, under the statute, the right of direct appeal to this Court.

STATEMENT OF FACTS

The bankrupt herein having capital stock of no par value, amounting in total to two hundred and fifty thousand shares, the tax was levied by the State of New York pursuant to Section 181, Article 9, of the Tax Law of the State of New York, which provides, as far as applicable to the case at bar, as follows:

> "Every foreign corporation * * * doing business in this State, shall pay for the use of the State a license fee of ⅛ of 1 per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital stock employed by it within this State during the first year of carrying on its business in this State; * * *. The measure of the amount of capital stock employed in this State shall be such a portion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets wherever employed in business. On the issued capital stock of any corporation issuing shares without designated monetary value such corporation shall pay for the use of the State a license fee of 6 cents on each such share employed in this State as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed

to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fee shall be paid shall be fixed by the State Tax Commission, which shall have the same authority to examine the books and records in the State of such foreign corporation, and the employees thereof, as it has in the case of domestic corporations, and the State Tax Commission shall have the same power to issue a warrant for the collection of such license fees as now exists with regard to domestic corporations."

The bankrupt corporation, pursuant to the provisions of the Tax Law, filed its annual report on or about the 12th day of June, 1925, the law requiring such reports to be filed annually on or before July 1 (New York State Tax Law, § 211). The License Fee imposed related back to the time when the foreign corporation received its right to do business in the State of New York; the value of such right being only determinable by the amount of capital stock employed in the State of New York during the first twelve months of the exercise of such right.

The bankrupt herein commenced doing business in the State of New York on or about the 12th day of November, 1924; consequently, this License Fee, payable as of said date, became due and determinable on or about November 13, 1925. It became the duty of the bankrupt corporation to file with the Department of Taxation and Finance of the State of New York a report known as "Form 240," giving the status of the corporation at the end of the first year of doing business within the State of New York. The corporation failed to file this report and, because of this delinquency, the State Tax Commission was obliged and

had legal authority to get its information as best it could, which accounts for the delay in the actual assessment of this License Fee which occurred on December 21, 1926. The report filed by the corporation and received in evidence shows that the bankrupt was incorporated in October, 1924, and commenced doing business in the State of New York on or about the 12th day of November, 1924. It further shows that up to June 30, 1925, two hundred and fifty thousand shares of stock of no par value had been issued, and the testimony further shows that this License Fee was assessed on the basis of the information contained in the corporation's own report, together with such other information as the Commission could secure, and that this License Fee was assessed on the basis of six cents per share on each of the two hundred and fifty thousand shares of non par value stock which had been issued. This resulted in an assessment of $15,000 under the statute.

The judgment appealed from does not question the method or amount of the assessment, but holds that the provision of § 181 of the Tax Law of the State of New York, providing that on issued capital stock of any corporation issuing shares without designated monetary value, such corporation shall pay for the use of the State a License Fee of six cents on each such share employed in this State as hereinbefore provided, violated the Fourteenth Amendment of the Federal Constitution, was unconstitutional and afforded no basis for the assessment made in this case.

This appeal, therefore, presents a pure question of law for the determination of this Court as to whether or not the statute is constitutional and whether the invalidity thereof claimed can be raised in the instant proceeding.

POINT I

The license fee exacted by the State of New York from foreign corporations seeking to do business in that State is distinguishable, in its assessment and nature, from a franchise tax.

The history of the creation of the license fee and its intended characteristics is stated in *People ex rel. Elliott-Fischer Co.* v. *Sohmer*, 148 App. Div. 514 (affirmed 206 N. Y. 634, on opinion below), as follows:

> "This license tax first came into our law by Chapter 240 of the Laws of 1895, which was entitled 'an act to provide for licensing foreign stock corporations.' It provided for such corporations then authorized to do business in this State, a license fee of one-eighth of one per centum, payable on December 1, 1895, 'to be computed upon the basis of the amount of capital stock employed by it within this state during the year preceding that date,' and for such corporations thereafter authorized to do business in this state it provided a like license fee payable before receiving the certificate of authority 'to be computed upon the basis of the capital stock employed by it within this state for its business during the first year of carrying on its business in this state.' The *tax* was to be paid but once. Chapter 143 of the Laws of 1886 imposed an organization tax on one-eighth of one per centum upon the capital stock of a domestic corporation, and in the year 1895 the Comptroller in his report to the legislature suggested that foreign corporations were required to pay no organization tax here, and, therefore, had an advantage over domestic corporations, which was an inducement to corporations to organize outside of the State to do business within the State, and he suggested that such cor-

porations should have no advantage over domestic corporations, and referred to the fact that the last legislature had passed an act which would compel foreign corporations to pay a *tax* similar to the organization tax of domestic corporations, but that the act was so defective that it was not suffered to become a law. It is evident by the passage of the statute in question immediately following the report, and from the nature of the act itself, that its purpose was to impose upon foreign corporations a *tax* similar to the organization tax required of domestic corporations."

POINT II

The license fee imposed on a foreign corporation is similar to the organization tax imposed by the State on domestic corporations.

Domestic corporations, proposing to issue stock of no par value, are required by the State of New York to pay, as part of the organization tax, five cents for each share of no par value stock authorized for issuance under its certificate. (Section 180, New York Tax Law.)

> "Every stock corporation incorporated under any law of this State shall pay a tax of one-twentieth of one per centum upon the amount of the par value of all the shares with a par value which it is authorized to issue and a tax of five cents on each share without a par value which it is authorized to issue, and a like tax upon any subsequent increase thereof."

This tax must be paid before or on incorporation, and no domestic stock corporation may lawfully exercise any corporate powers or privileges until such tax has been paid. (New York General Corporation Law,

Section 5.) The tax is imposed but once for the privilege of becoming a corporation. (*People ex rel. U. S. A. P. P. Co.*, 174 N. Y. 475, 478.) The tax being for the privilege of organization, and not a property tax, the power of the state to subject corporations availing themselves of the statute to any condition the legislature may see fit to impose cannot be questioned. (*People* v. *N. Y. C. & S. R. R. Co.*, 129 N. Y. 474, 480.) In the case of domestic corporations the payment of the statutory charge on authorized stock of no par value is clearly a condition precedent to the exercise of corporate rights.

The same right on the part of the state to prescribe any conditions it determines its welfare requires for the carrying on of corporate activity within its borders exists with respect to granting foreign corporations the right to do business.

In *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494 (47 Sup. Ct. Reporter, P. 179) it was held that the measure of admission fee to be paid by a foreign corporation is within the discretion of the State, and any inequality in that regard between foreign corporations and domestic corporations is not violative of equal protection clause of the Fourteenth Amendment. As Mr. Justice Taft said:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden, which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign

corporation must pay to become a *quasi* citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind."

There existed no material difference in the legislative treatment of domestic and foreign corporations. Domestic corporations paid five cents per share on authorized stock of no par value; foreign corporations were required to pay six cents per share on similar stock employed in the State of New York during the first year following the issuance of the certificate of authority to do business. The reason for the difference in time of payment is apparent. In the instant case, as stated in *Roberts & Schaeffer Co.* v. *Emmerson*, 271 U. S. 50, "the authority to issue its capital stock was a privilege conferred by another state, and bore no relation to any franchise granted to it by the State of Ohio, or to its business and property within that state." (In the instant case, substitute New York in place of "Ohio".)

Under Section 181 of the Tax Law, when one year shall have elapsed since the issuance of the certificate of authority, the report to the State Tax Commission would reflect the ratio of assets employed in the State of New York to those situated elsewhere and enable a determination of the proportion of stock of no par value employed in the State subject to the payment of the license or organization tax. Thereupon the extent of the liability of the foreign corporation to pay for the privilege theretofore granted was ascertainable

and its contract obligation to respond to this tax complete. The obligation was the same as in the case of organization tax by a domestic corporation, the difference in time of payment arising only because of the controlling necessities of the case.

POINT III

A foreign corporation is entitled to do business in the State of New York only at the discretion of such State, and under such terms and conditions as it may see fit to enforce. Such corporation is not, therefore, entitled to contest the constitutionality of the State statute embracing the conditions, assented to by the corporation, under which the certificate of the right to do business was granted.

In *People* v. *Fire Insurance Company of Philadelphia*, 92 N. Y. 311, the Court, per Finch, J., stated, page 325:

> "The situation is this: The state having the power to exclude foreign corporations, determines to do so unless they will submit to certain conditions. It meets the applicant on the border, forbidding admission, as it has a right to do, unless on condition that it will fulfill all the requirements of our statutes relating to foreign corporations, one of which is the very law here assailed. When the corporation comes in it agrees to the conditions. They become binding by its assent. The tax or license fee charged by the act of 1865 is one of these conditions. It is imposed as the price of admission to come within the jurisdiction, and not as a tax upon one already within the jurisdiction. The fourteenth amendment, therefore, has no application. It can apply to foreign insurance companies only after they have performed the conditions upon which they are entitled to admission. Any other view of the case involves this absurdity;

that the foreign company may agree to pay the tax charged by the act of 1865 so as to get within our jurisdiction, and then refuse to pay it while insisting upon the right to remain. It cannot agree to conditions as the price of admission, and after having been admitted turn around and dispute them. Even if the conditions were unconstitutional, which cannot be said of the terms of the act of 1865, considered as conditions, the foreign company may waive the objection. (*Embury* v. *Conner*, 3 N. Y. 511; *Sherman* v. *McKeon*, 38 N. Y. 267; *Phuyfe* v. *Eimer*, 45 N. Y. 103); and does do so when it accepts the conditions by coming in under them, and is estopped from raising the question. (*Vose* v. *Cockcroft*, 44 N. Y. 415.) Even where the condition was a violation of the Federal Constitution and the Supreme Court of the United States so declared, they refused to prevent the state from excluding the offending company and revoking its license. (*Doyle* v. *Continental Insurance Company*, 94 U. S. 535.) By that process, even in such a case, obedience could be compelled, at the peril of removal from the state."

In *Doyle* v. *Continental Insurance Company*, cited in the foregoing opinion, a law of Wisconsin provided that before a foreign insurance company could do business in that state, it should sign an agreement that in the event of being sued in that state it would not remove the case to the Federal courts, under the penalty of having its license immediately revoked by the Secretary of State. The law was confessedly invalid, nevertheless this stated:

"The effect of our decision in this respect is that the state may compel the foreign insurance company to abstain from federal courts or to

cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state. The state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant, under the laws or the Constitution of the United States, by its exclusion from the state, is infringed and this is what the state now accomplishes."

To the same effect is *Security Mutual Life Insurance Company* v. *Prewitt*, 202 U. S. 246.

On the application of the Thermiodyne Radio Corporation for the right to transact its business in the State of New York it agreed to comply with the statutory provisions respecting license fee and to pay to the state, as all similar corporations were obliged to do, six cents for every share of no par value stock used by it in the State of New York. Were this immediately ascertainable, as in the case of domestic corporations, the payment would have been at once exacted. But the proportionate part of such class of stock liable to the license fee could not be ascertained until after the company had transacted its business for a year. Its agreement, however, to pay the statutory amount was a present covenant made at the time of and in consideration of the issuance of the authority to do business in the State of New York. Whatever constitutional objection existed was waived by the corporation. Having agreed to the conditions as the price of admission, it could not thereafter after being admitted, turn around and dispute them. Whether the condition be regarded as precedent or subsequent, the waiver of any objection to the condition is complete

when the corporation assented thereto by receiving the privilege of being able to conduct its business, as granted by the State.

In *Ashley* v. *Ryan*, 153 U. S. 436, 443, Mr. Justice White stated:

> "It follows from these principles that a State in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. In *Paul* v. *Virginia*, *supra*, the court said, p. 181: 'Having no absolute right or recognition in other states, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose.'"

In accord is *Hooper* v. *California*, 155 U. S. 648, in which the opinion contains a collation of the authorities.

POINT IV

The case of *Air Way Co.* v. *Day*, 266 U. S. 71, upon the authority of which the district court decided this case adversely to the appellants, is not controlling.

The authority was an action brought against state officers of Ohio to restrain the collection of a franchise tax charged against the Air-Way Electric Appliance Corporation for the privilege of exercising its corporate franchise in Ohio during the year commencing July 1st, 1921, on the grounds that the legislation of

Ohio, under which the charge was imposed, was invalid under the commerce clause of the constitution and was repugnant to the Fourteenth Amendment.

Plaintiff was a Delaware corporation. Under its certificate of incorporation and the laws of that state, its authorized capital stock was 400,000 shares without par value, of which 200,000 shares were common stock and 200,000 shares founders' stock. Shortly after its incorporation, it obtained from the secretary of state, in conformity with the laws of Ohio, a certificate of admission to do business in that state, and also paid the initial fee for the privilege of there exercising its corporate franchise.

Under Act of May 14th, 1921 (109 Ohio Laws, p. 277), it was provided:

> "The amount of fees payable by a foreign corporation, having common stock without par value * * * shall be five cents per share upon the proportion of the number of shares of authorized capital stock, represented by property owned and used and business transacted in this state."

Plaintiff's report to the tax commission stated that the amount of business transacted in Ohio in the year ending July 1st, 1920, was $250,594.58, whereas that figure represented its total sales, of which only $70,802.30, or about 28%, was intrastate, and the balance, $179,792.28, or about 72%, was interstate. The state officers, assuming that all plaintiff's property and business was located and transacted in Ohio, made no apportionment between local and interstate business, and fixed the annual franchise tax at five cents per share on its total authorized stock.

The Supreme Court held that the assessment by the Ohio officials on interstate commerce was unauthorized by the Federal constitution, and that a franchise

tax assessment on all authorized capital stock, whether issued or not, was unauthorized.

Several material points of distinction from the instant case are suggested by the above recital of facts.

The nature of the tax obligations are different. The Air-Way case involved a franchise tax, not a license fee. A franchise tax must be based on property valuation, not upon an arbitrary assessment of so much per share without referring to property and assets in the assessing state. In this respect the law of the State of New York, in the assessing of franchise taxes, does not have an arbitrary rate of assessment, but under Section 182 of the Tax Law of the State of New York, such assessment is based upon report of assets and business transacted. The distinction between franchise taxes and license fees for permission to do business in the State is exhaustively treated in *People* v. *Sohmer*, 148 App. Div. 514 (affd. on opinion below in 206 N. Y. 634). Under this authority, the provisions relating to an organization tax of a corporation and the license fees are distinct, separate matters from franchise taxes, which depend for the amount upon business subsequently transacted. The same distinction was observed by the Federal Court in *Sweet* v. *The All Package Grocery Stores Co.*, 262 Fed. Rep. 727 (affd. by the U. S. Supreme Court under the designation of *Marshall* v. *The People of the State of New York*, 254 U. S. 380).

No interstate commerce is involved in the instant case, removing that feature of the Air-Way case from consideration.

Furthermore the Ohio statute based the tax on *authorized* capital stock, whereas the tax in the present case is based upon issued capital stock. The fact that "authorized" shares were made the basis of taxation was the principal ground of criticism of the

Supreme Court. This was subsequently so stated in *Roberts & Schaefer* v. *Emmerson*, 271 U. S. 50, wherein Mr. Justice Stone stated:

> "The authority to issue its capital stock was a privilege conferred by another state, and bore no relation to any franchise granted to it by the state of Ohio, or to its business and property within that state. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the Air-Way case, to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the state, but with a smaller capital authorized under the laws of the state of their creation."

In the instant case, the license fee was not based on authorized capital stock but on a properly ascertained proportion of issued non-par value stock employed in the State of New York.

POINT V

The determination of the amount of the license tax rests in the uncontrolled discretion of the State of New York.

In *People ex rel. U. S. A. P. P. Co.* v. *Knight*, 174 N. Y. 475, the nature of organization taxes upon domestic corporations, to which the taxes in the instant case are assimilated, was considered, and the Court of Appeals held that such taxes, although in the nature of license fees for the right to assume corporate existence, were a part of the taxing system of the State of New York, and that it was a sound doctrine to hold that the State, in granting a franchise to a corpora-

tion, may limit the powers to be exercised under it and annex conditions to its enjoyment and make it contribute to the revenue of the State.

> "If the grantee accepts the boon, it must assume the burden."

The Court further held there was no distinction in the policy of the State of New York in taxing domestic and foreign corporations, stating per Vann, J., p. 484:

> "In the instance of a foreign corporation, it is not its franchise that is taxed, because it is not subject to the laws of this state, but it is that intangible property which rests solely in the privilege allowed it of exercising its franchise within the State upon which the tax is levied."

The tax in the instant case is analogous to that construed in *Home Insurance Co.* v. *N. Y.*, 134 U. S. 594, where the tax was construed as being on the corporate franchise or business of the company and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax, and it was held that no constitutional objections lie in the way of a legislature prescribing any mode of measurement to determine the amount it would charge for the privilege it bestows.

Mr. Justice Fields, stated, page 599:—

> "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. * * * The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge

most befitting to its interests and policy. * * * No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. * * * It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction. It is true, as was said by this Court in *California* v. *Pacific Railroad Company*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but it may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the Legislature of the State; it cannot be furnished by the federal tribunals. * * * From the very nature of the tax being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other."

What is taxed is the privilege conferred to exercise a foreign franchise in the State of New York, a privilege which the state had the absolute right to withhold, and, when granted, could be subject to such conditions as the legislature sought fit to impose. The

tax was at a specified rate multiplied by the number of shares of non-par value stock employed in the State of New York. The charge was a fixed and determinable obligation, which, when the number of such shares was ascertainable after a year's operation under the license granted, accrued an obligation which the corporation assumed when it applied for and received the right to do business. It was a tax laid without reference to the character of the property in which the corporate capital stock was invested, said property being only taken cognizance of to make a proper apportionment of the stock for the purpose of determining the amount of the tax to be paid. Similarly, as in *Society for Savings* v. *Coite*, 6 Wall. 594, where the court held that the deposits of a savings bank were not taxed where the amount of such deposits was only considered for the purpose of determining the amount to be paid for the franchise conferred,

> "Reference is evidently made to the total amount of deposits on the day named, not as the subject matter of assessment, but as the basis for computing the tax required to be paid by the corporation defendants."

In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, the Court stated, in referring to a privilege tax for operating a railroad levied against a foreign corporation, page 229:—

> "There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, the means of ascertaining the privilege conferred."

or, as stated in *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S. 429, 576, "a charge for a privilege, or in the transaction of business, without any necessary reference to the amount of property belonging to

those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done." In the instant case it could not be increased, the maximum being determined by the total amount of non-par value stock, if the entire amount thereof was employed in the State of New York. It could be reduced from a maximum calculable when the license was granted, by failure to employ the entire amount of such stock authorized in the State of New York during the first year of operation.

POINT VI

No discrimination between foreign corporations liable to the payment of the license fee existed.

In the instant case all foreign corporations having stock of no par value are obliged to pay six cents for each share of such character of stock employed in its business in the State of New York, as a single privilege or license tax. Under these circumstances no violation of any of the provisions of the Fourteenth Amendment can occur. As stated in *Home Insurance Company* v. *New York*, 134 U. S. 594, 607:—

> "There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."

All foreign corporations were required to pay a license fee or tax of six cents for every share of non-par value stock employed in the State of New York. The tax was a uniform one based on number of shares, not on property represented thereby. No tax is sought to be imposed on the property of the corporations affected. As was aptly said by Mr. Justice Shiras, in *New York State* v. *Roberts*, 171 U. S. 658-664:

> "From the very nature of the tax, it being laid

as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

As Mr. Justice Brewer stated in *Michigan Central Railroad* v. *Powers*, 201 U. S. 245, 293:—

"There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an ironclad rule of equality, to prevent the classification of property for the purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and the collection of the tax is not inconsistent with natural justice."

As a necessary colloquy it follows, as stated by Mr. Justice Harlan in *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 123:—

"And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint stock companies and associations of the same kind are subject to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another *of the same class.*"

Where it is apparent that the tax was not levied on property, but a flat rate on proportion of capital stock employed, there can exist no discrimination provided all similar stock of corporations equally situated are taxed at the same rate. Classification of that intended to furnish the basis of taxation is within the competency of the legislature. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322.

The license fee was an entirely reasonable provision enacted to protect domestic corporations organized under the corporation laws of the State of New York. Such domestic corporations were required to pay, as part of the organization tax, five cents for each share of no par value stock authorized. The rate for foreign corporations was six cents. The tax bore equally on all foreign corporations. *People ex rel. Terminal and Town Taxi Corporation* v. *Walsh*, 202 N. Y. App. Div. 651, 656. This license fee, as stated in *People ex rel. Elliott-Fischer Co.* v. *Sohmer*, 148 N. Y. App. Div. 514, "Originated in an independent statute designed for a special purpose and complete in itself." As a tax on stock, similar in nature to a stamp impost, it applied equally to all foreign corporations having no par value stock. No possible discrimination could therefore exist.

In *Roberts* v. *Emmerson*, 271 U. S. 56, affirming the Illinois statute imposing a tax at a flat rate per share on stock of no par value, this Court answered the question as to any possible discrimination between that class of stock and par value stock, as follows:

> "These differences, both in the legal incidents and in the practical uses of the two classes of stock, not only are a basis for classification of them for the purpose of taxation, but make unavoidable certain differences in the method of assessing the tax. Authorized capital stock cannot well be used as the measure of a tax unless some

arbitrary value is assigned to the no par value shares, for they may be issued from time to time at varying prices, and, until issued, they cannot have any value. To require the stock to be issued at a value fixed in advance of its issue, and to make that value the basis of the tax, would in effect abolish no par value stock. Because of the essential differences between the two kinds of stock, it is difficult to conceive of any other method of assessing the tax which would save the character of no par value stock and not result in similar inequalities. The inequalities complained of result from a classification which, being founded upon real differences, is not unreasonable, and the discrimination which results from it is not arbitrary or prohibited by the Fourteenth Amendment. It is enough that the classification is reasonably founded upon or related to some permissible policy of taxation. (*Watson* v. *State Comptroller*, 254 U. S. 122; *Pacific Express Company* v. *Seibert*, 142 U. S. 339; *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89; *Clement National Bank* v. *Vermont*, 231 U. S. 120."

This decision was subsequently reaffirmed by this Court in *Margay Oil Corporation* v. *Applegate*, 273 U. S. 666, affirming 167 Ark. 614, holding that a statute of Arkansas fixing the value of non-par stock of foreign corporations at $25 per share for excise purposes did not violate the provisions of the Constitution, the State having the power to prescribe the method of ascertaining the value of a franchise and imposing a tax upon that basis.

In *American Uniform Co.* v. *Commonwealth*, 237 Mass. 42, the excise statute under consideration provided that corporations whose stock is issued without par value, shall pay on the basis of par value of $100

per share for said character of stock. The petitioner, a foreign corporation, contended that the actual value of its non-par value stock was not in excess of $10 per share and that the Tax Commissioner refused to receive evidence of actual value, but assessed the tax in accordance with the statute quoted. In holding the statute constitutional, Ruggs, Ch. J., for the Court, stated, page 44:—

> "Under the Federal and State Constitutions, the transaction of local business within this Commonwealth by foreign corporations is a privilege which may be granted or denied by the Commonwealth. If the sovereignty confers the gift, it may fix its own terms, provided they are not contrary to the Constitution. A fixed excise of $2,000, doubtless might be charged each foreign corporation for the privilege of doing here a local business without violating any right guaranteed by the Constitution of the United States. This is the maximum amount of the excise under any circumstances, no matter how large the capital. The excise simply is measured by the par value of the shares up to that fixed maximum. Before the enactment of St. 198, C. 235, as well as since, the actual value of the market value of the shares has been of no consequence, whatsoever. Two foreign corporations, each of the same amount of capital stock, at par, one on the verge of bankruptcy and its stock valueless both in truth and on the market, and the other highly prosperous and its stock both in truth and on the market worth double its par value, would pay the same excise under the law. The reason for this is that the tax is an excise and not a property tax. It stands on the same footing, in this respect in principal as most license taxes."

After a most learned discussion of the character of no-par value stock and the reason for making an arbitrary excise valuation and tax, the opinion concludes (page 46):

> "The present statute applies evenly to all foreign corporations seeking to avail themselves of the privilege of doing a domestic business within the borders of Massachusetts, and having capital stock without par value. • • • The petitioner is not singled out as a special object for hostile or discriminating legislation. • • • It cannot be said that this statute is unequal in its operation or that it deprives the plaintiff of its property without due process of law."

The Supreme Court of the State of Missouri, as late as February, 1928, decided in *State* v. *Pierce Petroleum Corporation*, 2 S. W.—2nd Series—790 that a franchise tax payable by a foreign corporation may be computed according to any method prescribed by the legislature, being an excise upon transacting business, and the method need not consider the value of the privilege. Ragland, J., in the opinion, stated:—

> "The tax is not a property tax, but an excise levied upon the privilege of doing business in this state as a corporation. (*State* v. *Tax Commission*, 282 Mo. 213.) It may therefore be computed according to any method the legislature sees fit to adopt. That method may or may not take into consideration the value of the privilege taxed. It is only necessary that the resulting tax be not obnoxious to the constitutional requirement of uniformity and equality. And these requirements are fully satisfied if the statute imposing the tax applies equally to all corporations in like conditions, and makes a reasonable and not a purely arbitrary classification."

After reviewing *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50; *American Uniform Co.* v. *Commonwealth*, 237 Mass. 42 and *State* v. *Margay Oil Corporation*, 167 Ark. 614, the opinion continued:—

> "The method provided by the statute is one of convenience and one which the legislature, in its discretion, had the right to prescribe."

With the right of the State to classify no par value stock in a separate category from par value stock, for the purpose of taxation, it follows that the license fee of six cents per share of each share of no par value stock used by a foreign corporation in the State of New York was within the constitutional power of the State, not rendered discriminatory because of a different method of computing the license fee from stock of par value. And not being a tax on property, but applying solely to the stock itself, it operated equally in respect to all foreign corporations employing that species of stock. (See *Detroit Mortgage Corporation* v. *Vaughan*, 211 Mich. 320; *American Uniform Co.* v. *Commonwealth*, 237 Mass. 42.)

POINT VII

Section 181 of the New York State Tax Law, as applicable to this case, is constitutional.

This was directly determined by the New York Court of Appeals in *People ex rel. Griffith* v. *Loughman*, 249 N. Y. 369; Official Edition Advance Sheets Dec. 29, 1928.

The decision in that case is so comprehensive and illuminating that, for the convenience of this Court, it is printed at length as an appendix to this brief.

POINT VIII

The claim of the State of New York should be allowed in full as a preferred claim.

Being a valid claim due and owing to the State, its preferential right of payment follows. (*Marshall* v. *New York*, 254 U. S. 380.)

CONCLUSION

The judgment appealed from should be reversed, with costs, and the case remanded to the United States Circuit Court of Appeals for the third circuit for further proceedings, in accordance with the opinion of this court, allowing the claim of the State of New York, for license fee, in the sum of $15,000, with interest at 6% per annum from November 13th, 1925, to date of payment as a preferred claim, and directing the trustees to pay the same accordingly.

Respectfully submitted,

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Counsel for Appellants.

APPENDIX

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, D. W. GRIFFITH, INC., *Relator-Respondents,*

against

MICHAEL F. LOUGHMAN, JOHN J. MERRILL and MARK GRAVES, constituting the State Tax Commission, *Respondent-Appellants.*

Appeal by State Tax Commission from an order of the Appellate Division, Third Department, annulling, on certiorari, a determination of the Tax Commission and remitting matter to the Commission for further action per opinion.

WENDELL P. BROWN, for Appellants.

E. CROSBY KINDLEBERGER, for Respondents.

Lehman, J.

The relator, D. W. Griffith, Inc., is a corporation organized under the laws of the State of Maryland. In July, 1920, it applied to the Secretary of State of New York for permission to do business in this State. Its authorized capital stock consisted of 500,000 shares of no par value.

At the time the relator began to do business in this State, the Tax Law (Section 181) provided: "Every foreign corporation • • • doing business in this

State shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in this state, to be computed upon the basis of the capital stock employed by it within this state during the first year of carrying on its business in this state, which first payment shall not be less than ten dollars, and if in any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid, then a license fee at the rate of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. * * * No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt from the comptroller for the payment of the license fee upon the capital stock * * *."

In *People ex rel. Elliott-Fisher Co.* v. *Sohmer*, 140 A. D. 515, affirmed 206 N. Y. 634, it was held that "the clear intention of the legislature was that this tax should be based upon the par value of the capital stock which is employed in business in the State." At the time the relator began to do business within the State, the statute did not expressly provide any measure for capital stock which had no par value. In *People ex rel. Terminal and Town Taxi Corp.* v. *Walsh*, 202 A. D. 651, the Appellate Division held that in such circumstances the tax must be based upon the actual capital of relator within this State.

The omission in the statute was supplied by an amendment to Section 181 of the Tax Law which took effect on May 12th, 1921, or about ten months after the relator began to do business in this State. "On the issued capital stock of any corporation issuing shares without designated monetary value, such corporation shall pay for the use of the state a license fee of six cents on each such share employed in this state as hereinafter provided." At the close of the first year of carrying on business within this State, the tax or license fee payable by the corporation has been fixed at six cents on each share of its capital stock employed in this State. The tax so fixed is much greater than it would have been if based upon the actual capital of the relator within this State in accordance with the practice which prevailed before the amendment of the statute; and the relator attacks the assessment on the ground that the amendment is unconstitutional, and that in any event it should not be construed as applying to corporations which had begun to do business in this State under certificate of permission issued by the Secretary of State before the amendment took effect.

There can be no doubt that the method of taxation embodied in the amended statute must result in some inequalities, corporations with stock having no par value are taxed on a basis entirely different from the tax assessed against corporations which have issued stock with a par value. The number of shares of capital stock having no par value bears no relation of any kind to the actual capital or business of the corporation. It can form, it is said, no legitimate basis for the imposition of a license tax upon a foreign corporation. Such considerations are clearly not without weight, and have led not only the court below but the Circuit Court of Appeals (Third Division) to hold the amendment unconstitutional, relying on the authority of *Air-*

Way Corporation v. *Day*, 262 U. S. 71. *Matter of Thermiodyne Co.*, 26 Fed. (2d) 713, affirmed October 31st, 1928 "on opinion of Judge Morris below." See also *People ex rel. Terminal & Town Taxi Corporation* v. *Walsh, supra*. We have reached the opposite conclusion in spite of the inequalities that may be produced by the tax.

The relator is a foreign corporation. The Legislature might have excluded it from the State. It chose to admit it upon condition that it pay a license fee or tax, just as a domestic corporation must pay a similar organization tax before it receives from the State corporate powers. The power of the State to impose upon a foreign corporation a license fee or tax as a condition precedent to its entry into the State is, from its nature, less subject to constitutional limitations than the power to impose a franchise tax as payment or compensation for the privilege of continuing to do business here. Different tests must be applied to determine the validity of attempted exercise of such powers. *Hanover Insurance Company* v. *Harding*, 272 U. S. 494. At least, in the former case, there need not be equality between domestic and foreign corporations.

Here, though the tax is called a "license" tax in the statute, it cannot be measured until one year after the corporation has received a certificate of authority to do business in the State, and payment is necessarily postponed until after that time. In strict sense, such payment is not a condition precedent to the entry of the corporation into the State. For that reason, in *Matter of Thermiodyne Co., supra*, the court held that the validity of the tax must be tested as if it were a "franchise" rather than a license tax. The test of the validity of the tax must be determined "by its substance—its essential and practical operation—rather

than its form and local characterizations." *International Paper Co.* v. *Massachusetts*, 244 U. S. 135. The State has admitted the relator subject to the condition that the corporation pay a license fee, just as a domestic corporation must pay an organization tax before it has any power to act. The measure of the tax adopted by the Legislature required postponement of the tax bill a year after the corporation began to do business. Only in that sense is such payment a condition subsequent. The obligation to pay arose when the corporation began to do business in the State, and the effect of failure to meet that obligation results not merely in the revocation of authority previously granted by the State to do business here, but acts as a bar to enforcement, within the State of contracts made in the course of such business. Essentially the tax constitutes the payment exacted for the privilege of entering into the State, even though in some particulars it is analogous to a franchise tax.

We have analyzed the essentials of the tax and its practical operation to indicate the question presented in this case. Authority is not lacking that the Legislature might have adopted the same measure as a basis even for a franchise tax. We are not called upon to define the extent of the legislative power beyond the limits of its exercise in this case. We do not attempt to determine whether the Legislature might have gone further.

In *Air-Way Corp.* v. *Day*, *supra*, the Supreme Court of the United States held that "the mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of the annual fee to be paid to a State for the privilege of doing business therein." The court pointed out several objections to the tax. "The inevitable effect of the act is to

tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that State. * * * Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business, intrastate or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances."

It is clear that neither of these objections can have any application in this case. The basis of the tax here is not the mere number of *authorized* shares of stock, but the number of *issued* shares of stock *used in this State*. There is therefore no direct burden on interstate commerce, even if such an objection could be raised to a tax exacted for the privilege accorded to a foreign corporation to enter the State. *Hanover Insurance Company* v. *Harding, supra*. Though the court does advert in its opinion to the circumstance that the number of non-par value shares of a corporation constitute no representation as to and has no relation to the amount of its capital, yet the fee or tax in that case was held unconstitutional, not because of that circumstance, but because it was based "on a number of shares in excess of those outstanding." The question of whether a State might impose a privilege tax on a corporation based, as here, upon the number of its issued shares of non-par stock or the proportion used in the State, was still left open.

That question was definitely decided in *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50. There the State

of Illinois imposed a franchise tax, on domestic corporations having no par value stock, upon the basis of the number of authorized shares of its capital stock which the Legislature declared "shall be considered to be of the par value of $100 per share." The court pointed out that the Air-Way case merely decided that such a tax imposed by the State of Ohio on a foreign corporation was invalid because the corporation's "authority to issue its capital stock was a privilege conferred by another State, and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State." Those objections do not apply to a tax imposed by the State from which the corporation derives its authority to issue stock. It may impose a franchise tax based upon the authorized corporate stock, whether issued or not.

Even so, the objection still remained that a "flat rate per share on no-par value stock, regardless of its value," may produce such inequalities as to result in "an unreasonable and discriminatory classification in which no-par value stock is placed in one class and taxed at an arbitrary valuation * * * while par value stock is placed in another class and taxed at the value at which it is authorized to be issued." The Court held that in spite of such inequalities the classification was reasonable. It pointed out that "because of the essential differences between the two kinds of stock, it is difficult to conceive of any other method of assessing the tax which would save the character of no-par value stock and not result in similar inequalities" unless the State should choose to abandon entirely its system of measuring the franchise tax payable by the par value of authorized corporate stock.

It would seem that for the same reasons a similar classification is reasonable where a tax on foreign corporations is measured by the number of issued shares of their capital stock or the proportion used in the

State, and in the case of *Margay Oil Corporation* v. *Applegate*, 273 U. S. 666, the court so held without opinion "on authority of *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50." The facts in that case are stated in the opinion of the State court in the same case (269 Southwestern 66). We find no distinction in principle between the classification adopted by the State of Arkansas and there sustained, and the classification which is challenged in the case now under consideration. For these reasons we hold that the statute is not unconstitutional, at least as applied to foreign corporations who after it became effective have entered the State and begun to do business here.

The question of whether the legislature intended to make the amendment apply to corporations which had already begun to do business under certificate of authority issued by the Secretary of State, and, perhaps even whether the Legislature could give effect to such intention, if it had it, is not free from doubt. We hold that under a fair construction of the amendment, the Legislature intended the amendment to apply only to corporations which thereafter begun to do business or which became obligated to pay an additional tax because in any year after the amendment became effective it employed additional taxable capital stock in the State.

We have pointed out that the payment of the tax is imposed for the privilege of entering into the State. Though it is lawful to begin to do business in the State without its payment, the Legislature has declared in effect that non-payment of the tax thereafter shall result in the withdrawal of the sanction previously given to do business here, even insofar as concerns business already done. The foreign corporation, having begun to do business, may not escape its obligation to pay the tax by subsequent withdrawal from the State. Though we assume that the Legislature has

power to change the tax at any time before the tax is assessed, yet a change in the tax might result in placing the foreign corporation, which has acted upon the sanction conditionally given in so unfair a position that the intention to make a change apply to such corporations should not be imputed to the Legislature. We may disregard inequality in the incidence of a tax between corporations having stock, with a par value and those having stock without par value, and even among corporations having stock without par value where that inequality is the result of a reasonable classification. If we construe the statute as intended to apply to corporations which had already obtained a conditional sanction to do business in the State, then this relator is subjected to inequality by reason of an unexpected change in conditions under which such sanction was offered and accepted. The measure of the obligation is changed after the obligation has been assumed. The circumstance that liability to pay an increased tax is based upon a transaction already completed might, indeed, raise doubt as to the power of the State to impose such liability. The statute should be construed in such manner as to free it from such doubt. The State should not be subjected to a justified charge of unfairness. "The general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Llewellyn* v. *Frick*, 268 U. S. 238. See also *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Blodgett*, 48 Supreme Court, 353.

It is said that if we exclude from the scope of the amendment the obligation of the relator to pay a tax "to be computed upon the basis of the capital stock

employed by it during the first year of carrying on its business in this State" we must likewise exclude from the scope of the amendment the additional tax which a foreign corporation already doing business in the State must pay "if in any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this State on which a license fee has not been paid." That, we think, does not follow.

The obligation to pay the additional license fee or tax will arise only when and if the foreign corporation chooses to employ additional capital in the State in any year after the amendment became effective. It is a future obligation dependent upon future acts within the power of the corporation to control, and as to that tax all foreign corporations which have received authority to do business here, and which have stock without par value, are treated in the same way. It is, too, essentially a different kind of tax from the tax payable at the end of the first year, in which the corporation has done business here. Payment of the additional tax is, perhaps, like payment of a franchise tax, a condition subsequent to continuing to do business here; but non-payment does not render contracts previously made in the course of business unenforceable in our courts. None of the arguments which lead to the conclusion that the Legislature did not intend to change, even if it could, the measure of a tax where the obligation to pay has already arisen though the time for its measurement and payment has not arrived, apply with force to an additional tax or fee which becomes payable because in any year after the amendment became effective, the corporation chooses to employ within the State additional capital.

For these reasons the order is affirmed with costs.